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DRUNKENNESS AS AN EXCUSE FOR CRIME.

The Early English Commentators.—The principle that drunkenness can be set up in defence of the commission of a crime has never been admitted into the English common law. “The law of England,” says Blackstone, “considering how easy it is to counterfeit that excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another:” 2 Black. Com. 25. In his History of the Pleas of the Crown, Sir Matthew Hale says: “The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many men in a perfect but temporary frenzy; but by the laws of England such a person shall have no privilege by this voluntarily contracted madness, but shall have the same judgment as if he were in his right senses:” p. 30. Hawkins, in his Pleas of the Crown, says: “That he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober.” Lord COKE, in his Commentaries, says: “As for a drunkard, who is *voluntarius dæmon*, he hath no privilege thereby, but what hurt or ill soever he doeth, his drunkenness doth aggravate it:” 247 a.

The Early English Cases.—In *Reniger v. Fogossa*, reported in Plowden, p. 19, it is laid down, “that if a person that is drunk kills another this shall be felony, and he shall be hanged for it; and yet he did it through ignorance, for when he was drunk he

had no understanding or memory ; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby." The same doctrine was enunciated by Lord MANSFIELD, who said in the celebrated case of the *Chamberlain of London v. Evans*, in the House of Lords in February 1767, that "a man shall not be allowed to plead that he was drunk, in bar of criminal prosecution, though, perhaps, he was at the time as incapable of the exercise of reason as if he had been insane ; because his drunkenness was itself a crime he shall not be allowed to excuse one crime by another."

The Modern English Cases.—In *R. v. Burrow*, decided in 1823 (1 Lew. C. C. 75), the prisoner was indicted for rape, and urged that he was in liquor. HOLROYD, J., addressed the jury as follows : "It is a maxim in the law if a man gets himself intoxicated, he is answerable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong. If, indeed, the infuriated state at which he arrived should continue and become a lasting malady, then he is not answerable." A similar charge was given to the jury in the next case in the same book, where drunkenness was urged, upon the trial of an indictment for burglary. Patrick Carroll was tried in 1835, at the Central Criminal Court, before a judge of the King's Bench and a judge of the Common Pleas, for the murder of Elizabeth Browning. It appeared that shortly before the homicide the prisoner was very drunk. His counsel, though he admitted that drunkenness could not excuse from the commission of the crime, yet submitted that in a charge for murder, the material question being whether the act was premeditated or done with only sudden heat and impulse, the fact of the party being intoxicated was a proper circumstance to be taken into consideration, and he referred to a case before HOLROYD, J., reported in 1 Russ. on Crimes 12 (*Rex v. Grindley*), where that doctrine was laid down. PARK, J., in summing up, said : "Highly as I respect that late excellent judge, I differ with him, and my brother, LITLEDALE, agrees with me. He once acted on that case, but afterwards retracted his opinion, and there is no doubt that that case is not law. I think that there would be no safety for human life if it were considered as law." The prisoner was convicted and executed : 7 C. & P. 145. And the same rulings were made by

ALDERSON, B., in *Rex v. Meakin*, 7 C. & P. 297 (1836), and by PATTESON, J., in *Reg. v. Cruse*, 8 C. & P. 546 (1838).

The American Doctrine.—The same doctrine—that voluntary drunkenness does not excuse a crime committed while in that state—is reiterated in a multitude of American cases: *State v. Keath*, 83 N. C. 626 (1880); *Cornwell v. State*, Mart. & Y. 147 (1827); *State v. McCants*, 1 Spears 393 (1843); *State v. Bullock*, 13 Ala. 413 (1848); *Tidwell v. State*, 70 Id. 33 (1881); *Cross v. State*, 55 Wis. 261 (1882); *Friery v. People*, 54 Barb. 319 (1865); 2 Keyes 424; *People v. Robinson*, 1 Park. 649 (1854); 2 Id. 235 (1855); *State v. Thompson*, 12 Nev. 140 (1877); *Shannahan v. Com.*, 8 Bush 464; *State v. Turner*, Wright 20 (1831); *U. S. v. McGlue*, 1 Curt. C. C. 1 (1851); *U. S. v. Drew*, Baldw. 28 (1828); *Boswell v. Com.*, 20 Gratt. 860 (1871); *State v. Mullen*, 14 La. Ann. 570 (1859); *Rafferty v. People*, 66 Ill. 118 (1872); *McKenzie v. State*, 26 Ark. 335 (1870); *People v. Williams*, 43 Cal. 344 (1872); *State v. Hurley*, 1 Houst. Cr. Cas. 28 (1858); *Mercer v. State*, 17 Ga. 146 (1854); *Shannahan v. Com.*, 8 Bush 463; 8 Am. Rep. 465 (1871); *Schaller v. State*, 14 Mo. 502 (1851); *State v. Harlow*, 21 Id. 446 (1855); *People v. Cummins*, 47 Mich. 334 (1882); *State v. Grear*, 28 Minn. 426 (1881); *Kelly v. State*, 3 S. & M. 518 (1844); *Kenney v. People*, 27 How. Pr. 202; 18 Abb. Pr. 91; 31 N. Y. 330; *O'Brien v. People*, 48 Barb. 274 (1867); *People v. Rogers*, 18 Id. 9 (1858); *People v. Garbutt*, 17 Mich. 9 (1868); *Golden v. State*, 25 Ga. 527; *Respublica v. Weidle*, 2 Dall. 88 (1781); *U. S. v. Claypool*, 14 Fed. Rep. 127 (1882); *Com. v. Hart*, 2 Brewst. 546 (1868); *Com. v. Dougherty*, 1 Browne 20, App. (1807); *U. S. v. Forbes*, Crabbe 559 (1845); *Com. v. Hawkins*, 3 Gray 463 (1855); *State v. Bowen*, 1 Houst. Cr. Cas. 91 (1859); *People v. Fuller*, 2 Park. 16 (1823); *Marshall v. State*, 59 Ga. 154 (1877); *Estes v. State*, 55 Ga. 30 (1875). In *People v. Willey*, 2 Park. 19, tried in New York, in 1823, the prisoner was charged with perjury in swearing out a warrant. His counsel offered to prove that he was intoxicated at the time he came before the magistrate and obtained the warrant, and stated that such a defence had been admitted by Chief Justice SPENCER in a case of perjury. WALWORTH, Cir. Judge: "It is a general rule in criminal prosecutions that the intoxication of the accused is no defence and forms no excuse for the commission of a crime. It has been frequently so decided, even in the case of

murder, though Judge VAN NESS once permitted the fact of intoxication to be proved to rebut the presumption of malice where a man had been killed in a sudden affray, and to show that the act was the effect of sudden passion and not of premeditation. But the correctness of that decision has been much doubted. There can be nothing in a case of bare-faced perjury like the present to take it out of the general rule. There must be some mistake about the case said to have been decided by Chief Justice SPENCER. But even if he did so decide, it was contrary to the uniform decisions of courts in relation to such a defence and, therefore, cannot be the law." The prisoner was convicted. In *People v. Porter*, 2 Park. 14, in the same state, in 1823, the prisoner was indicted in New York for blasphemy. His counsel offered to prove that he was so beastly drunk that he did not know what he said. WALWORTH, J., "That is no excuse, and only aggravates the offence." But there are three cases, which may be called the leading cases on this topic, both on account of the frequency with which they have been subsequently cited and the exhaustive discussion of the principle which they contain. These cases are *Choice v. State*, decided in Georgia in 1860; *Cornwell v. State*, decided in Tennessee in 1827, and *People v. Rogers*, decided by the Court of Appeals of New York in 1858.

In *Choice v. State*, 31 Ga. 424 (1860), the prisoner having been convicted of murder, it was urged in the Supreme Court that his drunken condition at the time of the commission of the crime should have been allowed to extenuate the offence. But LUMPKIN, C. J., said: "Whether any one is born with an irresistible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself I capitally doubt whether it ever can be. And if it were, how far this crazy desire for liquor would excuse from crime it is not for me to say. That this controlling thirst for liquor may be acquired by the force of habit, until it becomes a sort of second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition however I plant myself immutably; and from it nothing can dislodge me but an act of the legislature, namely: that neither moral nor legal responsibility can be avoided in that way. This is a new principle sought to be engrafted upon criminal

jurisprudence. It is neither more nor less than this, that a want of will and conscience to do right will constitute an excuse for the commission of crime; and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrong doing. If this doctrine be true—I speak it with all seriousness—the Devil is the most irresponsible being in the universe. For, from his inveterate hostility to the Author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder until it is as hard for an Ethiopian to change his skin as for them to cease to do evil; but the inability of Satan to control his will to do right is far beyond that; and yet our faith assures us that the fate of Satan is unalterably and eternally fixed in the prison-house of God's enemies. The fact is, responsibility depends upon the possession of will, not the power over it. Nor does the most desperate drunkard lose the power to control his will, but he loses the desire to control it. No matter how deep his degradation the drunkard uses his will when he takes his cup. It is for the pleasure of the relief of the draught that he takes it. His intellect, his appetite and his will all work rationally, if not wisely, in his guilty indulgence, and were you to exonerate the inebriate from responsibility you would do violence both to his consciousness and to his conscience, for he not only feels the self-prompted use of every rational power involved in accountability, but he feels, also, precisely what this new philosophy denies—his solemn and actual wrong-doing in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, just compose him so as to reach his clear, constant experience, and he will confess that he realizes the guilt, and therefore the responsibility of his conduct. A creature made responsible by God never loses his responsibility save by some sort of insanity. There have always existed amongst men a variety of cases wherein the will of the transgressor is universally admitted to have little or no power to dictate a return to virtue. But mankind have never, in any age of the world, exonerated the party from responsibility, except when they were considered to have lost rectitude of intellect by direct mental aberration."

In *Cornwell v. State*, Mart. & Yerg. 147 (1827), the prisoner, also accused and convicted of murder, urged in the Supreme Court of Tennessee his intoxication as an excuse. CRABB, J., in deliv-

ering the opinion of the court, said: "Three cases of conviction for murder have been brought before this court at the present term; in two of which, the prisoner was defended in the court below, on the ground of madness occasioned by drunkenness; and yet in neither does it seem to us was there a colorable foundation for such a defence. This court would be remiss in the performance of their duty if they did not, under these circumstances, declare the law explicitly on this most important subject. In the argument of these causes very untenable positions have been assumed, and very dangerous doctrines have been advanced by counsel. And from what was stated by some of those counsel, these doctrines have been repeatedly urged, and sometimes sanctioned in the courts below. It has become fashionable of late to discourse and philosophize much on mental sanity and insanity. New theories have been broached, and various grades and species of mania have been indicated. Some reasoners have gone so far as to maintain that we are all partial maniacs. Whatever differences of opinion there may be as to the construction and operations of the mind of man, whatever difficulty in discovering the various decrees of unsoundness, it is only necessary for us to ascertain the kind of prostration of intellect which is requisite to free a man from punishment for crime by the law of the land. It is with this alone we have to do. What the law has said, we say. In all things else we are silent. We put our feet in the tracks of our forefathers; *Non meus hic sermo, sed quæ præcepit Offellus*. Let us then for a moment resort to the sages of the law of different ages, and learn from them whether that species of frenzy which is produced by inebriety constitutes any excuse for crime, and what sort of insanity it is which will serve this purpose?"

After reviewing the early English writers and judges on the subject the court concluded: "In the above extracts we see the law in this respect. A contrary doctrine ought to be frowned out of circulation, if it has obtained it, by every friend of virtue, peace, quietness and good government. The history of criminals and criminal trials shows that he who has not learned betimes to restrain the evil inclinations of our nature—envy, malice, revenge, and their kindred passions—but has a sufficiency of moral sense left to deter him from the commission of enormity while sober, will often 'screw his courage to the sticking-point' by the free use of ardent spirits, and thus made able to

silence the twinges of his conscience, will voluntarily imitate the dæmon. But let courts once approve the doctrine now contended for, and it will not be resorted to as a plea by persons of this description alone; but even the cold-blooded, calculating assassin will never be a sober homicide; he will always exhibit himself at the bar of a court of justice as a specimen of insanity produced by drunkenness. And thus this degrading and disgraceful, yet too common vice, instead of being hunted from society as the bane of good morals and social and domestic happiness, will be converted into a shield to protect from punishment the worst of crimes. All civilized governments must punish the culprit who relies on so untenable a defence; and in doing so they preach a louder lesson of morality to all those who are addicted to intoxication, and to parents, and to guardians, and to youth, and to society, than 'comes in the cold abstract from pulpits.'

"In order to be clearly understood we have supposed the strongest case,—a case of entire prostration of intellect immediately occasioned by drunkenness, and have said that that constitutes no excuse. Instances, however, of heinous offences, committed under such circumstances, are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what he thinks when sober."

In *People v. Rogers*, 18 N. Y. 9 (1858), the prisoner was convicted of a murder committed while intoxicated. On the trial his counsel requested the court to charge that if it appeared by the evidence that the condition of the prisoner from intoxication was such as to show that there was no intention or motive, by reason of drunkenness, to commit the crime of murder, that the jury should find a verdict of manslaughter. But the court refused to instruct the jury in the words of the proposition, but charged that under the old law intoxication was an aggravation of crime; but that intoxication never excused crime unless it was of the degree to deprive the offender of his reasoning faculties. On appeal to the Supreme Court this was declared error and the conviction reversed. The case then went to the Court of Appeals. There the ruling of the trial court was affirmed. "The principle," said DENIO, J., "that

drunkenness shall not excuse crime, is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication ; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow men and to society, to say nothing of more solemn obligations to preserve, so far as it lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society.

* * * Assuming the foregoing positions to be established, I proceed to an examination of the exceptions to the charge of the judge. It is difficult to know precisely what was meant by the request to charge ; but I think its sense may be expressed thus—that drunkenness might exist to such a degree that neither an intention to commit murder, nor a motive for such an act, could be imputed to the prisoner. It was, therefore, asked that it should be left to the jury to determine whether such a degree of intoxication had been shown, and that they should be instructed that if it had, the prisoner should be found guilty of manslaughter only. We must lay out of view, as inapplicable, the case of a person who had become insensible from intoxication, and was performing an act unaccompanied by volition. There was nothing in the evidence to show that the prisoner's conduct was not entirely under the control of his will, or which would render it possible for the jury to find that he did not intend to stab the deceased with his knife. The mind and will were no doubt more or less perverted by intoxication, but there was no evidence tending to show that they were annihilated or suspended. Assuming, therefore, that the request did not refer to such a hypothesis, the only other possible meaning is, that it supposes that the jury might legally find that the prisoner was so much intoxicated that he could not be guilty of murder, for the

want of the requisite intention and motive; and the request was that they might be so instructed. This would be precisely the same thing as advising them that they might acquit of murder on account of the prisoner's intoxication, if they thought it sufficient in degree. It has been shown that this would be opposed to a well established principle of law. The judge was not at liberty so to charge, and the exception to his refusal cannot be sustained. What he did charge on the subject of intoxication was more favorable to the prisoner than he had a right to claim. It implies that if he was so far intoxicated as to be deprived of his reasoning faculties, it was an excuse for the crime of murder; or, as perhaps it was intended to state, that he could not be guilty of murder. The rule which I have endeavored to explain, assumes that one may be convicted of murder or any other crime, though his mind be reduced by drunkenness to a condition which would have called for an acquittal, if the obliquity of mind had arisen from any other cause. The judge ought to have charged that if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so, and that he must take the consequences of his own voluntary act: *Rex v. Thomas, supra*. The charge, therefore, gave the prisoner the chance of an acquittal, to which he was not entitled; but this was not an error of which he can take advantage."

Not now considered an Aggravation.—The old English writers regarded drunkenness as an aggravation of the crime; and there are expressions in some American cases to the same effect: *Com. v. Hart*, 2 Brewst. 546; *U. S. v. Forbes*, Crabbe 559; *U. S. v. Claypool*, 14 Fed. Rep. 127. But this is not strictly correct. In *McIntyre v. People*, 38 Ill. 515, the court had told the jury that "drunkenness is no excuse for crime, but rather an aggravation of it." On appeal this was held erroneous. "We are aware," said the court, "that text writers frequently say that drunkenness is no excuse for crime, but rather an aggravation of the offence. That it is no excuse is certainly true, but that it should be held in law to aggravate crime is not, we conceive, a correct proposition. In ethics it is no doubt true, but how it can aggravate a wilful, deliberate murder, perpetrated with malice preconceived, and deliberately perpetrated, we are unable to comprehend. Or, that it will aggravate what in law is only manslaughter, if perpetrated by a sober man, into murder if committed by a drunken man, is not, we conceive, true. Or that it increases a minor offence to one of a

higher grade is not true. Whilst it is not ground for reversing a judgment, it is, perhaps, calculated to prejudice the defendant's case, and a court might well omit to give it, or at least to modify it before it should be given." In *Ferrell v. State*, 43 Tex. 503, a similar instruction was given by the trial court. In the Court of Appeals it was said: "The court told the jury that the condition of the defendant at the time of the homicide, the result of intoxication, was an aggravation of the offence, and should be regarded by the jury—thus in effect telling them if the defendant was intoxicated he might properly be convicted of a higher grade of offence than the facts otherwise required; for it will be observed it is the offence and not its penalty which the court tells the jury is aggravated by appellant's intoxication. It is needless for us to say that the law of this state gives no warrant for any such doctrine. While intoxication is certainly no excuse, much less justification, for crime, it is a startling idea that the bare fact of one being in this condition when the homicide is committed converts murder in the second into murder in the first degree, or will authorize, if not require, the jury to impose the penalty of death or confinement for life instead of a term of years. This would be directly the reverse of the rule laid down by the code, and would make the fact that the homicide was committed when the perpetrator was incapable of a deliberate intention and formed design to take life or do other serious bodily injury, for want of a sedate mind, an aggravation instead of a mitigation of the heinousness of the offence."

The Exceptions to the General Rule.—To the general principle, which it has been seen is so well established, that voluntary drunkenness cannot excuse or palliate a crime, and evidence that the prisoner was intoxicated at the time is, therefore, irrelevant, there are several exceptions which may be conveniently grouped under eight heads, viz.:

- (a) *Insanity produced by Intoxication.*
- (b) *Premeditation and Deliberation.*
- (c) *Intent.*
- (d) *Knowledge.*
- (e) *Threats.*
- (f) *Provocation.*
- (g) *Self-Defence.*
- (h) *Involuntary Intoxication.*

(a) *Insanity produced by Intoxication.*—Where the habit of intoxication, though voluntary, has been so long continued as to produce disease which has so destroyed the mental faculties of the accused as to render him insane—make him unable to distinguish between the right and wrong of the act he does—he is as much excusable as though his insanity was the result of an involuntary disease: *Fisher v. State*, 64 Ind. 435 (1878); *Bradley v. State*, 31 Id. 492 (1869); *Cluck v. State*, 40 Id. 263 (1872); *Carter v. State*, 12 Tex. 500; *Beasley v. State*, 50 Ala. 149 (1873); *O'Brien v. People*, 48 Barb. 274 (1867); *Erwin v. State*, 10 Tex. App. 700 (1881); *State v. Dillahun*, 3 Harr. (Del.) 551 (1840); *State v. Hurley*, 1 Houst. Cr. Cas. 28 (1858); *State v. Till*, Id. 233 (1867); *Macconnehey v. State*, 5 Ohio St. 77 (1855); *U. S. v. Clarke*, 2 Cranch C. C. 158 (1818); *Golliher v. Com.*, 2 Duv. 163 (1865); *State v. McGonigal*, 5 Harr. 510; *Real v. People*, 42 N. Y. 270 (1870); *Schlencker v. State*, 9 Neb. 241 (1879); *Bailey v. State*, 26 Ind. 422 (1866); *Boswell's Case*, 20 Gratt. 860 (1871). Even in England where the general principle is adhered to so strictly this exception is recognised. In *R. v. Burrow*, Lewin 75, tried at the York assizes of 1823, the prisoner being indicted for rape urged that he was drunk. HOLROYD, J., charged the jury as follows: "It is a maxim of law that if a man gets himself intoxicated, he is liable to the consequences, and is not excusable on account of any crime he may commit when infuriated with liquor, provided he was previously in a fit state of reason to know right from wrong. If, indeed, the infuriated state at which he arrives should continue and become a lasting malady, then he is not amenable." In *Rennie's Case*, Lewin 76 (1825), the prisoner was indicted for burglary, and urged in mitigation that he was drunk. HOLROYD, J., to the jury: "Drunkenness is not insanity, nor does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual and thereby rendering the party incapable of distinguishing between right and wrong." And see *R. v. Dixon*, 11 Cox 41; *R. v. Leigh*, 4 F. & F. 915. In this country the case of *United States v. Drew*, 5 Mason 28, is regarded as the leading authority upon this exception. The prisoner was tried before Mr. Justice STORY, in the United States Circuit Court for the district of Massachusetts, in 1828, for the murder of one Clark, while on board the ship John Jay, of which

Drew was master and Clark second mate. At the trial the principal facts were not contested, but the defence set up was the insanity of the prisoner at the time of committing the homicide. It appeared, that for a considerable time before the fatal act, Drew had been in the habit of indulging himself in very gross and almost continual drunkenness; that about five days before it took place, he ordered all the liquor on board to be thrown overboard, which was accordingly done. He soon afterwards began to betray great restlessness, uneasiness, fretfulness and irritability; expressed his fears that the crew intended to murder him, and complained of persons, who were unseen, talking to him and urging him to kill Clark, and his dread of so doing. He could not sleep, but was in almost constant motion during the day and night. The night before the act he was more restless than usual, seemed to be in great fear, and said that whenever he laid down there were persons threatening to kill him if he did not kill the mate, etc., etc. In short, he exhibited all the marked symptoms of the disease brought on by intemperance called delirium tremens. Upon the closing of the evidence the court asked Blake, the district attorney, if he expected to change the posture of the case. He admitted, that unless upon the facts, the court were of opinion that this insanity, brought on by the antecedent drunkenness, constituted no defence for the act, he could not expect success in the prosecution.

Mr. Justice STORY instructed the jury to acquit. "We are of opinion," said he, "that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is, or is not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. But the crime must take place and be the *immediate* result of the fit of intoxication, *and while it lasts*; and not, as in this case, a remote

consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal in a moral point of view such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to have been convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes which remotely produced it. Many species of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."

(b) *Premeditation and Deliberation.*—The second exception is that where the crime of murder is by statute divided into degrees, the higher degree requiring proof of deliberation and premeditation, evidence of intoxication is admissible upon the question whether the act was committed with deliberation or premeditation, or both. In *Swan v. State*, 4 Humph. 136 (1843), the trial court was asked to charge as a matter of law that drunkenness would reduce the crime of murder in the first degree to that of murder in the second degree. The court in reply said that drunkenness was no excuse or justification for crime. In the Supreme Court, on appeal, it was said: "The legal correctness of the general statement of the court is abundantly sustained by a long and unbroken series of authority in ancient and modern times, and by none more strongly and fully than by this court in the case referred to in Martin & Yerger's reports. Whatever ethical philosophy may make of the matter, such, probably, for stern reasons of policy and necessity, will ever remain the doctrine of criminal courts. But, although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact affecting such state and condition of the mind, is a proper subject for

consideration and inquiry by the jury. The question in such case is, what is the mental *status*? Is it one of self-possession, favorable to the formation of fixed purpose by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits. In such case it matters not that the provocation was inadequate, or the spirits voluntarily drank; the question is, did the act proceed from sudden passion, or from deliberation and premeditation? What was the mental *status* at the time of the act and with reference to the act? To regard the fact of intoxication as meriting consideration in such a case is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has, in point of fact, been committed. If the mental state required by law to constitute the crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by drunkenness or such other cause, but has not, in fact, been committed." And this doctrine has been endorsed in several subsequent cases in Tennessee: *Pirtle v. State*, 9 Humph. 663 (1849); *Haile v. State*, 11 Id. 156 (1850); *Cartwright v. State*, 8 Lea 376 (1881); *Lancaster v. State*, 2 Id. 576 (1879). The same doctrine has been announced in Connecticut in two recent cases: *State v. Johnson*, 40 Conn. 136 (1873); *State v. Johnson*, 41 Id. 585 (1874); and similar rulings are to be found in other states: *Jones v. State*, 29 Ga. 594 (1860); *Hopt v. People*, 104 U. S. 631; *People v. Lewis*, 36 Cal. 531 (1869); *People v. Nichol*, 34 Id. 212 (1867); *People v. King*, 27 Id. 507 (1865); *People v. Williams*, 43 Id. 344 (1872); *People v. Belencia*, 21 Id. 544 (1863); *Curry v. Com.*, 2 Bush 67 (1867); *Kelly v. Com.*, 1 Grant Cas. 484 (1858); *Keenan v. Com.*, 44 Penn. St. 55 (1862); *Jones v. Com.*, 75 Id. 403 (1874); *Colbath v. State*, 2 Texas (App.) 391 (1877); *People v. Odell*, 1 Dakota 197 (1875); *Lan-ergan v. People*, 6 Park. 209; 50 Barb. 266 (1867); *People v. Batting*, 49 How. Pr. 392 (1875). Of these cases *Jones v. State*, 29 Ga. 594, contains an exhaustive argument in favor of allowing evidence of intoxication to be shown, not to excuse the crime but to show that it was not committed at all. "One side in the argument," says the court in this case, "affirms as a great principle, that no man, drunk or sober, should be punished for a crime which

he did not have sufficient mind to perpetrate ; and the other replies, with an equally important principle, that drunkenness is no excuse for crime. The two sides each relying upon its chosen principle, have arrived at singularly conflicting conclusions. The truth is, that both these principles are correct and constitute, with the just deductions from them, but parts of an harmonious whole, sustained by law and sanctioned by reason ; * * * one is this : Drunkenness is no excuse for crime ; therefore, drunkenness cannot be used for any purpose of defence in a criminal accusation, a *non sequitur*, if ever there was one. Ignorance of chemistry is no more an excuse for crime than drunkenness ; therefore, if the reasoning be good, ignorance of chemistry cannot be used for any purpose of defence in a criminal accusation. If Dr. Webster, on his celebrated trial at Boston, some years ago, for the murder of Dr. Parkman, could have shown that he was ignorant of chemistry, he could have shown conclusively, not that he had an excuse for the murder but that he did not commit it ; for the slayer, whoever he was, had carried the dead body through a process of destruction involving high chemical knowledge. No doubt the court would have allowed him to save his life by proving his ignorance of chemistry, although ignorance of chemistry was no excuse for crime. Suppose now, the doctor could have proved that he had been drunk to the point of stupor or mania potu during the time when that chemical process must have been performed. No doubt the court would have allowed him to do so—not to excuse, mitigate or extenuate his crime, but simply to show in a very satisfactory way that he had not committed the crime ; for it is exceedingly improbable that a man in that degree of drunkenness could have conducted the chemical process, and Dr. Webster would have been allowed to save his life by proving that he was drunk. Some years ago I knew an attempt at house-burning, where the slow-match, found after the fire had been extinguished, exhibited great ingenuity in the bending of wires and crooking of pins in a peculiar way, so as to secure both slowness and certainty of ignition. The crooking of the pins, especially, in a manner so peculiarly adapted to the end in view, was the theme of village wonder for weeks afterwards, and is still remembered by many persons as a remarkable display of mechanical genius. Now there were two or three men who frequented that village in those days, any one of whom, if suspicion had fallen on him, could have proved that at any time for

a week before the fire, he had been too drunk to crook a pin. Would any man have discarded that evidence if he had been seeking for the truth? Both these illustrations show the absurdity of excluding the consideration of drunkenness in investigating the act which enters into the alleged crime; but another form of the fallacy is, that when the act appears to have been done by the accused, he shall not be allowed to excuse his act by any consideration of his drunkenness. It might be sufficient to reply to this by saying, the law says, that for crimes, not acts, drunkenness shall be no excuse. This form of the fallacy ignores utterly the most important element of the crime; for the mental part of the crime is criminal in morals and religion, without its union with any act whatever, while neither in law or morals has the act any criminality whatever until connected with a criminal state of mind. Acts need no excuse, crimes do. This form of the fallacy put a drunken man not on the same platform with sober men but on a much more disadvantageous one. The act when done by appropriate means carries a presumption against all men, sober or drunk, that it was intended to be done; but this proposition is to leave it but a presumption against sober men and to fix it irrevocably against a drunken man. The proposition admits that drunkenness, like any other 'no excuse' for crime, may be used to throw light on the investigation into the physical constituent of the crime, but denies that it may be used in examining into the mind, which is the special field where drunkenness displays its power; that is to say, it may be used in that part of the investigation on which it ordinarily throws least light, but must be excluded from that branch on which it usually throws most light. Can there be a sensible reason for such a discrimination between the purposes for which drunkenness may be used? It is too apparent to need argument that when the act is shown the mental constituent of the crime still remains to be investigated, and in this investigation there can be no rational discrimination made between the light which may be shed upon it by drunkenness, and that which may be shed by any other fact in the world. Let me illustrate this branch of the investigation: The fact of being a skilful physician is no more an excuse for crime than drunkenness is, and, therefore, if the reasoning in the last form of the fallacy be good the fact of being a skilful physician ought not to be used for the purpose of showing with what intention an act was done. A man indicts another for an attempt to poison him, and

proves that the accused actually administered arsenic to him. Here the act is done, and the sole question is as to the intent with which it was done. The accused simply shows that he was a skilful physician, and this single fact, in connection with the other fact that the man did not die but got well, explains the whole case and shows that the act was done with an innocent and praiseworthy intention; for if a skilful physician should intend to kill by arsenic he would infallibly regulate the dose to kill and not to cure. And here the man is permitted 'to excuse' his act in the language of the fallacy by proving his own superior knowledge, a fact which of all others is surely the last which ought to be allowed to excuse any crime. Is it not plain that he does not use the fact 'to excuse his act' but simply to show that the act was an innocent one which needed no excuse? Shall not drunkenness be used for the same purpose when it can shed the same light? A skilful marksman shoots at a bird at a short distance, but misses the bird and kills a man who was behind the bush, and who turns out to be one with whom the marksman had a deadly feud. He is indicted for murder. The fact that a man so skilful with his gun should have missed the bird at so short a distance, and should have hit his enemy, makes a strong impression that the shooting at the bird was but a pretence to cover the real intention to slay his enemy. But the man shows that he was very drunk, a fact which renders it at once very probable that he should have missed the bird, and very improbable that he had sufficient capacity for so deep an artifice as the one imputed to him, for drunken men are much more apt to be the victims than the perpetrators of tricks. Is there in the world an enlightened Christian or a barbarian who will say that this man ought not to be allowed to save his life by proving that he was drunk? The fact has no effect to excuse his crime nor to excuse his act, but to show that his act, though an unfortunate one, was innocent and needed no excuse; or else to show that it was not an act of murder but an act of involuntary manslaughter, in the pursuit of a lawful intent without due caution and circumspection. On the question of murder, his drunkenness is in his favor, but on the question of carelessness in the pursuit of his lawful intent, it is against him, for carelessness is much more easily believed of a drunken man than of a sober man. His drunkenness saves him from the one charge and convicts him, perhaps, of the other, not

by excusing the one crime, nor aggravating the other, but simply by shedding the light of truth upon both."

In other states again, evidence of drunkenness to grade a crime is not received. In Missouri the decisions are uniform in refusing to make this exception to the general rule. It is said in that state: "However differently the question may have been elsewhere determined, we are not disposed to overthrow the rule thus established in this state, believing it to rest upon reason and authority, and that any departure from it would neither be in the interest of a higher civilization nor promotive of the best interests of society, nor conducive to the ends of justice:" *State v. Edwards*, 71 Mo. 324 (1879), citing *State v. Harlow*, 21 Id. 446; *State v. Cross*, 27 Id. 332; *State v. Hundley*, 46 Id. 416; *State v. Dearing*, 65 Id. 530. Therefore drunkenness will not repel any inference of malice and premeditation arising from other facts in the case or mitigate the offence to a crime of a less degree: *State v. Dearing*, 65 Mo. 530 (1877).

In Vermont it has been held that where a murder is done by some kind of wilful, deliberate and premeditated killing, other than by means of poison or lying in wait, the degree of the offence is not lessened by proof that at the time it was committed the prisoner was intoxicated any more than it would be if it had been perpetrated by means of poison or by lying in wait: *State v. Tatro*, 50 Vt. 483 (1878). This case is noticeable for a very forcible criticism of the reasons and ruling in *State v. Johnson*. Said the court, per REDFIELD, J., "In the case of the *State v. Johnson*, 50 Conn. 136, the court held that intoxication, as tending to show that the prisoner was incapable of deliberation, might be given in evidence. Chief Justice SEYMOUR dissented, and FOSTER, J., who tried the case below, did not sit, so that the four judges constituting the court, were in fact, equally divided. The same case came before that court again in 41 Conn. 584, and the opinion was delivered by the same judge. The court were hard pressed with the former opinion in the same case, and that it had taken a departure from the common law. But the court repelled the intimation and declared that 'we have enunciated no such doctrine,' but held 'on a trial for murder in the first degree, which, under our statute requires actual express malice, the jury might and should take into consideration the fact of intoxication, as tending to show that such malice did not exist.' And in the same opinion the

judge says: 'Malice may be implied from the circumstances of the homicide. If a drunken man takes the life of another, unaccompanied with circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though no express malice is proved. Intoxication which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice. Intoxication, therefore, so far from disproving malice, is itself a circumstance from which malice may be inferred. We wish, therefore, to reiterate the doctrine emphatically, that drunkenness is no excuse for crime; and we trust it will be a long time before the contrary doctrine, which will be so convenient to criminals and evil disposed persons, will receive the sanction of this court. This reasoning seems to us both illogical and incongruous. To constitute murder in the first degree, the act must, indeed, be done with malice aforethought and that malice must be actual, not constructive. At common law, if the accused shoot his neighbor's fowls and by accident kill the owner, he is guilty of murder, yet he did not intend to murder but to steal. Such cases are excluded by the statute from the definition of murder in the first degree; but 'where the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural and probable effect of any act deliberately done was intended by its actor,' 2 Am. Crim. Law. 944; and intent for an instant before the blow, is sufficient to constitute malice: *Id.* 948. It will be admitted that if the respondent had killed his victim 'by poison or lying in wait,' the act would have been murder in the first degree, and the fact that he was intoxicated could not have been admitted to excuse or palliate the crime. Yet it is claimed that if the circumstances show that the murder was deliberately planned, and executed with fiendish barbarity and malice, drunkenness may come in to palliate the crime. This, we think, is making a distinction without a difference. Chief Justice HORNBLOWER, 2 Am. Crim. Law, § 1103, speaking of the New Jersey statute, which is like ours, says: 'This statute, in my opinion, does not alter the law of murder in the least respect. What was murder before its passage is murder now—what is murder now was murder before that statute was passed. It has only changed the punishment of murder in certain cases; or rather, it prescribes

that, in certain specified modes of committing murder, the punishment shall be death, and in all other kinds of murder, the convict shall be punished by imprisonment.' ”

(c) *Intent*.—On the question whether a person in committing an act has done so with the intent requisite to constitute it a crime, evidence of intoxication is held relevant. Thus it has been ruled in England that a person who was at the time so drunk as not to know what she was doing could not be convicted of an attempt to commit suicide: *R. v. Moore*, 3 C. & K. 319. Other English cases recognise this doctrine: *R. v. Monkhouse*, 4 Cox 55. In *R. v. Meakin*, 7 C. & P. 297, the prisoner was indicted for stabbing with intent to kill. He was proved to have been “something the worse for liquor,” at the time. ALDERSON, B., charged the jury thus: “It is my duty to tell you that the prisoner’s being intoxicated does not alter the nature of the offence. If a man chooses to get drunk, it is his own voluntary act; it is very different from a madness which is not caused by any act of the person. That voluntary species of madness which it is in a party’s power to abstain from, he must answer for. However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.”

In *Reg. v. Cruse*, 8 C. & P. 541 (1838), the prisoner and his wife were tried in 1838, before PATTESON, J., for the murder of a natural child. It appears that they were both drunk at the time. The judge in charging the jury said: “Although drunkenness is no excuse for any crime whatever; yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all and yet he may be guilty of very great violence. If you are not satisfied that the prisoner, or either of them, had formed a positive intention of murdering this child, you may still find them guilty of an assault.” The prisoners were convicted of assault.

The American cases are more numerous. In *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13, where the crime was larceny, the court held that if the prisoner was too drunk to entertain a felonious intent

could not be convicted. *State v. Bell*, 29 Iowa 316, was a prosecution for breaking and entering a dwelling-house with intent to commit larceny. "The drunkenness," said the Supreme Court "is a proper circumstance and should be weighed by the jury in determining whether there existed the specific intent to commit the felony charged. Whether he had the intent charged, whether he was capable of conceiving it, or whether he was so completely overcome by his debauch as to be incapable of forming any purpose, were questions for the jury. If, as claimed by defendant, he blundered into this house through a drunken mistake, under such circumstances as to show an entire absence of reason, or such as would indicate the inability to form any definite purpose, and especially of committing a larceny, then there was no guilt, at least not the offence here charged. The accused may have been guilty of a very great *fault*, but there is in reason and law a very clear distinction between this and the *intentional* injury or crime contemplated by the statute." In *Scott v. State*, 12 Tex. App. 31, the charge was assault with intent to rob, and it was held that evidence of drunkenness was relevant on the question of intent. In *Roberts v. People*, 19 Mich. 401, the charge was shooting with intent to kill, and it was laid down that where an offence is an act combined with an intent to commit an offence not actually committed, if the prisoner was rendered by intoxication incapable of entertaining the intent he is not guilty. The Supreme Courts of Minnesota and California are divided in the question whether drunkenness can be urged as an excuse for voting twice at an election—the former holding that it can, the latter that it cannot: *State v. Welch*, 21 Minn. 22; *People v. Harris*, 29 Cal. 678.

A number of cases in other states, support the admission of evidence of drunkenness as to the question of intent: *State v. Maxwell*, 42 Iowa 208 (1875); *Wenz v. State*, 1 Tex. App. 36 (1876); *Loza v. State*, Id. 488 (1877); *U. S. Bowen*, 4 Cranch C. C. 604 (1835); *State v. Schingen*, 20 Wis. 74 (1865); *State v. Collenan*, 27 La. Ann. 691 (1875); *State v. Trivas*, 32 Id. 1086 (36 Am. Rep. 293) (1880); *Henslie v. State*, 3 Heisk. 202 (1871); *State v. Garvey*, 11 Minn. 154 (1866). *Contra*: *O'Herrin v. State*, 14 Ind. 420 (1860); *Dawson v. State*, 16 Id. 428 (1861). As to the relevancy of drunkenness on the question of malice, see *Nichols v. State*, 8 Ohio St. 435 (1858); *Shannahan v. Com.*, 8 Bush 463; 8 Am. Rep. 465 (1871).

(d) *Knowledge*.—In *Pigman v. State*, 14 Ohio 535, it was held that on an indictment for passing a counterfeit bill, the drunkenness of the accused at the time was relevant; and the same ruling was made in an earlier case in the Federal Court: *U. S. v. Roudenbust*, Baldw. 514.

(e) *Threats*.—In *R. v. Thomas*, 7. C. & P. 817, it was said by PARK, J.: “Where the question is whether words have been uttered with a deliberate purpose or are merely low and idle expressions the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse.” In a Delaware case, the judge, in explaining the exception to the rule that evidence of intoxication is not admissible on the question of the guilt of a crime, said, “The other is when antecedent threats, menaces or malicious and revengful expressions are proved to have been uttered by the accused when drunk or intoxicated, and when it always becomes a legitimate matter for the grave consideration of the jury, whether they are but the idle and unmeaning declarations and denunciations of an angry and drunken man merely, or are probably to be regarded as of graver and more serious and sober import, denoting an actual intent to do what he threatens; for the law presumes a drunken man to be capable of conceiving and entertaining even express malice aforethought and perpetrating with premeditation and design murder in the first degree under the statute: *State v. Hurley*, 1 Houst. Cr. Cas. 28 (1858). In *Eastwood v. People*, 3 Park. 25 (1855), it was said: “That it was of great importance for the jury to know whether the prisoner was or was not intoxicated is obvious. It clearly did not necessarily follow because the prisoner used the expressions which I have referred to that he really entertained the design which the words import. It, not unfrequently happens, that when men are wrought up to a pitch of frenzied excitement by intoxication or by passion their language assumes a degree of violence far beyond any deliberate purpose which they have formed. Instances of this kind must have come under the observation of every man of experience.”

(f) *Provocation*.—In *R. v. Thomas*, 7 C. & P. 817, PARK, J., said to the jury: “I must also tell you that if a man makes himself voluntarily drunk, that it is no excuse for any crime he may com-

mit whilst he is so ; he must take the consequences of his own voluntary act, or most crimes would otherwise be unpunished. But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober," and this is the law in the United States : *State v. Hurley*, 1 Houst. Cr. Cas. 28 (1858); *Jones v. State*, 29 Ga. 607 (1860); *State v. McCants*, 1 Spears 384.

(g) *Self Defence*.—In *Marshall's Case*, Lewin 76, tried before PARK, J., in the year 1830, on an indictment for stabbing, the judge told the jury that they might take into consideration, the fact of the person being drunk at the time in order to determine whether he acted under a bona fide apprehension that his person or property was about to be attacked.

In *Goodier's Case*, York Summer Assizes 1831, PARK, J., directed the jury to the same effect.

In *Reg. v. Gamlen*, 1 F. & F. 90 (1858), the prisoner was indicted for assault. The charge arose out of an affray at a fair, and there was ground for supposing that he acted under apprehension of an assault upon himself. All concerned were drunk. CROWDER, J., charged the jury that, "Drunkenness is no excuse for crime, but in considering whether the prisoner apprehended an assault on himself, you may take into account the state in which he was." He was acquitted. But consult *Golden v. State*, 25 Ga. 527 (1853).

(h) *Involuntary Intoxication*.—The last exception requires no argument. A person who had been made drunk by the fraud or artifice of another would not be punishable for a crime committed while in that state, if his condition was such as to render him not criminally liable had his mental state been caused by disease : *Bartholomew v. People*, 104 Ill. 605.

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